Supreme Court, U. S.
FILED
DEC 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6293

PHILIP J. GOLDBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

DONALD C. SMALTZ
Arco Tower–Suite 4404
515 South Flower Street
Los Angeles, California 90071

Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER, PHILIP J. GOLDBERG 1

I. THE GOVERNMENT'S ARGUMENT THAT THE TERM "STATEMENT," AS DEFINED IN THE JENCKS ACT, HAS DIFFERENT MEANINGS FOR DIFFERENT PERSONS IS ERRONEOUS 3

A. The Contention that Investigators and Attorneys Have Different Purposes or Utilize Different Styles in Taking Notes is Unsupported by the Record and is Irrelevant to the Issues in this Case 3

B. The Issue is Whether Newman Adopted or Approved the Writings of the Prosecutors 5

C. Congress' Concern Was Not With Protecting the Notetaker, but Rather the Witness, and the Work Product Doctrine Was Not a Concern of Congress 7

D. The Risk That an Attorney Can Be Required to Testify in a Proceeding May Not be Used as an Excuse for Denying the Production of Relevant Material 10

II. THE PROPOSAL OF THE GOVERNMENT TO DISPENSE WITH EVIDENTIARY HEARINGS AND IN CAMERA INSPECTION BY THE TRIAL COURT IS PREPOSTEROUS 13

A. It Was Not Until After this Court Granted Certiorari That the Government Revealed For the First Time That Forty Pages of the Notes Were Written by the Witness Newman 14

Page

B. An Analysis of the Notes Reveals Detailed Recordation of Information Received From Newman 19

III. THE FAILURE OF THE TRIAL COURT TO COMPLY WITH THE EXPRESS REQUIREMENTS OF THE JENCKS ACT WAS PREJUDICIAL ERROR REQUIRING A NEW TRIAL 23

IV. THE FAILURE OF THE GOVERNMENT TO PRODUCE AND IDENTIFY NEWMAN'S HANDWRITTEN NOTES SHOULD BE CONSIDERED PLAIN ERROR, AND REQUIRES REVERSAL 26

A. The Doctrine of "Plain Error" Enables This Court to Consider Errors of Grave Dimension Which Fall Without the Grant of Certiorari 31

B. The Facts in This Case Establish Violations of Both the Jencks Act and the Doctrine of *Brady v. Maryland* 32

CONCLUSION 35

EXHIBIT "A", Affidavit of Donald C. Smaltz 1a

EXHIBIT "B", Reporter's Transcript of Trial Proceedings, pages K60-63 ..... 4a

TABLE OF AUTHORITIES

Cases: *Page*

Bary v. United States, 292 F.2d 53 (10th Cir. 1961) 24

Brady v. Maryland, 373 U.S. 83 (1963) ..... *passim*

Campbell v. United States (I), 365 U.S. 85 (1961) ... 11, 12, 14

Campbell v. United States (II), 373 U.S. 487 (1963) 6

Clancy v. United States, 365 U.S. 312 (1961) 24, 25

Davis v. Alaska, 415 U.S. 308 (1974) 34

Page

Giglio v. United States, 405 U.S. 150 (1972) 27, 28-29, 33

Hickman v. Taylor, 329 U.S. 495 (1947) 12, 29

Jencks v. United States, 353 U.S. 657 (1957) 9, 24

Mooney v. Holohan, 294 U.S. 103 (1935) 28

Napue v. Illinois, 360 U.S. 264 (1959) 28, 33

Ogden v. United States, 303 F.2d 724 (9th Cir. 1962) 11, 30

Palermo v. United States, 360 U.S. 343 (1959) .. 11, 12, 14, 24

Rogers v. United States, ___U.S.___, 45 L.Ed.2d 1 (1975) 32

Saunders v. United States, 316 F.2d 346 (D.C. Cir. 1963) 9, 10, 11

Silber v. United States, 370 U.S. 717 (1962) 31

United Brotherhood, C.J. v. United States, 330 U.S. 395 (1947) 31

United States v. Aaron, 457 F.2d 865 (2d Cir. 1972) 25

United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944) 25

United States v. Aviles, 315 F.2d 186 (2d Cir. 1963) 9, 12, 30

United States v. Aviles, 200 F.Supp. 711 (S.D.N.Y. 1961) 12

United States v. Aviles, 337 F.2d 552 (2d Cir. 1964) 9

United States v. Chitwood, 457 F.2d 676 (6th Cir. 1972) 11

United States v. Cleveland (I), 477 F.2d 310 (7th Cir. 1973) 25

United States v. Crosby, 294 F.2d 928 (2d Cir. 1961) 9

	Page
United States v. McKeever, 271, F.2d 669, 674 (2d Cir. 1959)	10, 24
United States v. Missler, 414 F.2d 1293 (4th Cir. 1969); cert. denied 397 U.S. 913 (1970)	25
United States v. Nixon, 418 U.S. 683 (1974)	10, 14
United States v. Nobles, 422 U.S. 225 (1975)	9, 12, 29
United States v. Tomaiolo, 280 F.2d 411 (2d Cir. 1960)	6, 11, 24
United States v. Wisener, 494 F.2d 516 (5th Cir. 1974)	29
Other Authorities:	
106 Cong. Rec. 15927 (1957)	9
H.R. Rep. No. 700, 85th Cong., 1st Sess. (1957)	3, 5, 6
Constitution and Statute:	
United States Constitution:	
Fifth Amendment	6, 7, 9, 34
Sixth Amendment	34
18 U.S.C. §3500 (The Jencks Act)	*passim*
Rules:	
Fed. R. Civ. P. 26(b)(3)	29
Fed. R. Civ. P. 40(1)(d)(2)	31
Fed. R. Civ. P. 52(b)	31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6293

PHILIP J. GOLDBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

REPLY BRIEF FOR PETITIONER, PHILIP J. GOLDBERG

Contrary to the Government's assertions, the primary issue in this case is *not* "whether the Government trial attorneys' notes of conversations with a Government witness, prepared by the prosecutors to enable them adequately to present the Government's case before the jury, are the kind of witness' 'statements' contemplated

by the Jencks Act." (Resp. Br. at 19, 26)[1] Rather, the questions in this case on which this Court granted the writ of certiorari are three:

> 1. Does the Jencks Act contain an attorney's work product exception?
>
> 2. Are a Government attorney's notes of conversations with a key Government witness to whom the prosecutors read back their notes from time to time, where the witness corrected same, which notes were prepared "only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached," compellable under the Jencks Act?
>
> 3. If the materials are not compellable under the Jencks Act, are they compellable under the doctrine of *Brady v. Maryland*?

The Government and petitioner agree that the Jencks Act does not contain a work product exception. (Resp. Br. 19, 27) That is all, however, upon which there is agreement. After this concession, and in response to issue number two *supra*, the Government contends that "generally an attorney's notes of witness' interviews will not be 'statements' within the meaning of the Jencks Act" (Resp. Br. at 19), and that the Jencks Act "problems can be avoided by defining the term 'statement' strictly where lawyers' notes are involved, as Congress intended."[2] (Resp. Br. at 21)

---

[1]"Resp. Br." refers to Brief for the United States. "O. B." refers to Petitioner's Opening Brief. "Ap." refers to Appendix.

[2]Nothing cited in the Government's brief stands for the proposition that Government attorneys' notes were accorded or meant to be afforded a special and different standard, under the terms of the Jencks Act, from other agents of the Government.

I.

THE GOVERNMENT'S ARGUMENT THAT THE TERM "STATEMENT," AS DEFINED IN THE JENCKS ACT, HAS DIFFERENT MEANINGS FOR DIFFERENT PERSONS IS ERRONEOUS

The Jencks Act defines a statement of a witness, so far as is relevant to the issues in the case at bench, as "a written statement made by said witness and signed *or otherwise adopted or approved* by him." (18 U.S.C. §3500(e)(1), emphasis added) It is clear that Congress intended that nonverbatim summaries of a witness' words should be producible, if the witness had been given an opportunity to sign, verify, authenticate, or approve in some fashion what is contained in the summary (H.R. Rep. No. 700, 85th Cong., 1st Sess. 6 (1957)). The Government's proposed dichotomous definition of the term "statement"–based on whether attorneys or other agents of the Government record the witness' words–is without support in either the terms or the legislative history of the Jencks Act.

A. The Contention That Investigators And Attorneys Have Different Purposes Or Utilize Different Styles In Taking Notes Is Unsupported By The Record And Is Irrelevant To The Issues In This Case

In support of its proposed strict construction of "statements," the Government in effect proposes a redefinition of the term "statement" as used in the

Jencks Act. This redefinition is predicated upon several questionable premises, including the assumption that all lawyers invariably take notes the same way, and inevitably insert trial strategy, mental impressions and other material not part of a witness' "statement" when they take notes. (Resp. Br. at 16, 20-21, 29, 35 n.21, 37-38, 40-46) This assertion, which pervades the Government's brief, is both unsupported by the record and unsupportable as a matter of fact. Individual differences in style among attorneys, the importance of the witness, the scope of the expected testimony, the amount of time available for the interview, the availability of other recorded statements, and the purposes for which the notes are being taken, as well as various other factors, will influence the amount of detail in the notes and the degree to which they are verbatim. These differences are illustrated by the notes of the prosecutors in this case.[3]

Similarly, the fact that notes as to a witness' knowledge may be taken by a trained investigator does not exclude the possibility that the investigator's notes may include more than " 'raw' data." (Resp. Br. at 41 n.28) Investigators, like attorneys, take notes in different ways under different circumstances. The stage of the investigation, whether suspicion has focused on the witness, the amount of time available to the investigator, the circumstances under which the interview is conducted (time of day and location), and the amount of information available to the investigator at the time he makes his notes, each will affect the

[3]*See, e.g.*, notes of the two different prosecutors in this case—Lebowitz and Keilp—lodged by respondent.

quantity, detail, content, and manner of recording the witness' words. To argue that the attorney thus must take "very different kinds of notes" from those prepared by an investigator (Resp. Br. at 35 n.21) is a facile generalization. The Government's speculations, explanations, and conclusions as to how and why an investigator or attorney takes notes or records interviews lend nothing to the resolution of the issues before this Court. Petitioner submits that the idiosyncracies and proclivities of the notetaker, be he an agent or attorney, are endless. We do not think that is a matter for resolution before the Court and, in the context of the case at bench, the Government's conjecture is irrelevant.

B. The Issue Is Whether Newman Adopted Or Approved The Writings Of The Prosecutors

Another erroneous assumption by the Government is that the principal term to be defined is "statement," and a substantial portion of the Solicitor General's brief is devoted to the attempt to demonstrate that the notes an attorney makes are not statutory "statements" under 18 U.S.C. §3500(e)(1). (Resp. Br. at 27 *et seq.*) To this end, the Solicitor General quotes extensively from the legislative history of the Jencks Act. Congress was indeed concerned that a witness need not be attacked through a summary of a statement "which the witness has never seen and never approved and which was prepared by someone else." (H.R. Rep. No. 700, 85th Cong., 1st Sess. 6 (1957)) However, Congress did *not* require that the witness in all cases must write out the

statement himself, nor that the witness must affix his signature to the paper, to enable it to be his under the statute. *Campbell v. United States (II)*, 373 U.S. 487, 492 (1963). *See also United States v. Tomaiolo*, 280 F.2d 411, 413 (2d Cir. 1960). The critical definition, therefore, in the circumstances of this case is not of the term "statement," but rather of the phrase "adopted or approved."

The Congressional intent with respect to the meaning of adoption or approval is not precisely set forth. Nevertheless, the thrust of the provision was to insure that "[u]nless the witness has been in some way informed of the statements attributed to him and has indicated his approval of their accuracy, the summaries should not be turned over to the defense." (H.R. Rep. No. 700, 85th Cong., 1st Sess. 6 (1957)) In the context of the case at bench, it is clear that this concern has been met. *First*, "[t]hese entries were often prepared only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached." (Resp. Br. at 18) *Second*, there was also reading back of their notes by the prosecutors, and correction of them by the witness Newman. (Ap. at 89-93) *Third*, these notes were taken in the context of interviews conducted pursuant to a plea bargain whereby the witness had agreed to waive his Fifth Amendment rights "and give to the United States a complete statement under oath concerning those events which are the subject for prosecution in [the petitioner's case]," expressly acknowledging that the pretrial statement under oath would be used against him (Newman) if he failed to testify in conformity with that statement at trial. (Ap. at 48-49) *Fourth*, these

notes were taken at interviews held in partial fulfillment of the agreement to render a complete statement, and represent deliberate waiver of the witness' Fifth Amendment rights at an off-the-record continuation of the prior partial, recorded interview. (Ap. at 52) It is clear, therefore, that both the witness Newman and the prosecutors had the utmost interest in preparation of an accurate record: Newman in insuring that his statements prior to trial were preserved properly to guarantee his anticipated benefits from cooperation with the Government; and the prosecutors in insuring that they had accurately set forth Newman's story, both to prepare themselves for trial and to bind Newman in case he entertained second thoughts about the context of his testimony at trial. Thus, in the context of this case, there can be no legitimate claim that disclosure of the prosecutors' recordation of Newman's words would unfairly prejudice Newman.

C. Congress' Concern Was Not With Protecting the Notetaker, But Rather The Witness, And The Work Product Doctrine Was Not A Concern Of Congress

The Government contends that Congress was expressly concerned that "Government trial attorneys' notes not be subject to routine inspection" and that, therefore, those notes which do not fit the precise template designed by the Government are not statements at all. (Resp. Br. at 29)

Petitioner has reviewed the legislative history of the Jencks Act cited by respondent (Resp. Br. at 49-51)

and found that with one exception[4] the only mention of attorneys' notes in the legislative history was in Senator Hruska's remarks (cited in Resp. Br. at 51) Senator Hruska's remark, in the context of the debate then occurring and on its face, indicates that the Senator's concern was "not . . . to have a witness impeached by material for which he himself was not responsible." Thus, the concern was not with the work product issue, as suggested by the Government, but rather with impeaching a witness who had no control over what was written and might be attributed to him. The focus of Congress was *not* on protecting the *prosecutor*, but on protecting the *witness*.[5] It is also

[4]The exception is the mention of the narcotics case in the Southern District of New York referred to in S. Rep. No. 981, 85th Cong., 1st Sess. 9 (1957) (Resp. Br. at 51), which is not sufficiently identified to permit a determination of what notes were requested, what foundation had been laid, or even if the notes related to the testimony of a Government witness. The Government also stresses the inclusion of the phrase, "made to an agent of the Government," as meaning "enforcement officials," and alleges that, "in common parlance," this excludes United States Attorneys. (Resp. Br. at 52 n.32) Petitioner is unaware where this "common parlance" originates; counsel, as a former Assistant United States Attorney, was under the distinct impression that the United States Attorney was the chief law enforcement official in each federal district.

[5]Petitioner has also noted that the quotation from Senator Javits' remarks (Resp. Br. at 52 n.32) is presented out of context. Senator Javits' observation, which was italicized by the Government, actually occurs in the course of a discussion between Senators Javits and Watkins as to *whether United States Marshals are "enforcement officials."* Lest Senator Javits' perception of the Congressional intent as to whether trial attorneys are covered by the disclosure provisions of the Jencks

significant that the statement of Attorney General Herbert Brownell, Jr., in support of the legislation (H.R. Rep. No. 700, 85th Cong., 1st Sess. 7-12 (1957)), listing in detail the dangers posed by expansive interpretation of the *Jencks* decision (*Jencks v. United States*, 353 U.S. 657 (1957)), did not mention disclosure of attorney preparation, but rather emphasized the danger unrestrained disclosure posed *to other investigations and cases.*

While the absence of express consideration of attorney work product by Congress is certainly subject to more than one interpretation, it does *not* manifest a congressional intent to exclude what might be both work product and a paragraph (e) statement from the scope of the disclosure provisions of the Jencks Act. The decisions cited by the Government, including *United States v. Nobles*, 422 U.S. 225 (1975), and *United States v. Aviles*, 337 F.2d 552 (2d Cir. 1964), are not to the contrary.[6]

Act be misunderstood, his remarks immediately following are worth quoting in full:

> "I am willing to say this to the Senator: I would be glad, for myself, to apply the provisions of this bill to all officials of the Federal Government. If the words do go that far, it is perfectly all right with me, and I know exactly what I am voting for. I think they do." 106 Cong. Rec. 15927 (1957) (remarks of Senator Javits).

[6]The authority of *United States v. Crosby*, 295 F.2d 928, 951 (2d Cir. 1961), cited by the Government as recognizing this Congressional intent, is doubtful in light of the later decision of *United States v. Aviles*, 315 F.2d 186, 191 (2d Cir. 1963), which adopted the extensive analysis of the relationship between the Jencks Act and the work product doctrine performed by Mr. Justice Reed in *Saunders v. United States*, 316 F.2d 346, 349-50 (D.C. Cir. 1963), who determined that there was no work product exception to the Act's disclosure requirements.

"If the [prosecutor's] notes contain both verbatim remarks of the witness and personal observations of the attorney, then paragraph (c) of the Act requires that the district judge inspect the statement and excise the protected material if this is possible. And if it is not clear from reading the notes whether or not they contain substantially a verbatim description of the witness' remarks, the court should conduct a hearing to resolve the matter." *Saunders v. United States*, 316 F.2d 346, 350 (D.C. Cir. 1963).

See United States v. McKeever, 271 F.2d 669, 674 (2d Cir. 1959).

D. The Risk That An Attorney Can Be Required To Testify In A Proceeding May Not Be Used As An Excuse For Denying The Production Of Relevant Material

The Government alleges that requiring production of an attorney's interview notes of a witness "creates an undue risk that attorneys will be required to testify." (Resp. Br. at 45) Petitioner suggests that an attorney always faces a possibility of having to testify any time a witness recants–be it on direct or cross–something which that witness previously stated to the attorney. However, that ever-attending possibility can not be used as an excuse to foreclose the "full disclosure of all the facts within the framework of the rules of evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974).

Even under the restrictive definition of statements proposed by the Government (Resp. Br. at 53-54, 60), if the witness testifies inconsistently with the recordation the Government attorney made, the attorney may

still be called to the stand or requested to stipulate to the accuracy of his recordation. An examination of the statutory procedure for resolution of controversies regarding Jencks Act statements reveals that no real burden is placed on the Government.

After the defense has made an initial showing to the effect that the prosecutor did interview the witness and that the witness has "signed or otherwise adopted or approved" the prosecutor's recordation of the witness' story (18 USC § 3500(e) (1)), the defense must move for disclosure (paragraph (b)). If the Government claims that the materials do not constitute a statement, or that they contain extraneous material, the trial court *must* make an in camera inspection and take such additional evidence as is required to resolve the issue outside the presence of the jury.[7] The prosecutor may be called upon to explain to the trial judge the manner of creation of the statement, as may the witness, but this is done outside the hearing of the jury, and defense counsel is not permitted to see the statement unless and until the trial court has determined that the statement is compellable and has excised those portions which are not related to the witness' testimony. *See Palermo v. United States*, 360 U.S. 343, 354-55 (1959). Such procedure has been approved by this Court (*id.* at 354)

---

[7] *Campbell v. United States (I)*, 365 U.S. 85, 92-96 (1961); *Palermo v. United States*, 360 U.S. 343, 354-55 (1959); *United States v. Chitwood*, 457 F.2d 676, 678 (6th Cir. 1972); *Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963); *Ogden v. United States*, 303 F.2d 724, 733 (9th Cir. 1962); *United States v. Tomaiolo*, 280 F.2d 411, 413 (2d Cir. 1960).

and, as past cases indicate, imposes no extraordinary hardship on the prosecution.[8]

The "parade of horribles" which the Government seeks to trot out, citing Mr. Justice Jackson, concurring in *Hickman v. Taylor*, 329 U.S. 495, 517 (1947) (Resp. Br. at 47-48), in effect was rejected by this Court when it initially adopted the in camera inspection procedure. *See Palermo v. United States*, 360 U.S. at 354-55.

> "The function of prosecution and defense at the inquiry [is] not so much a function of their adversary positions in the trial proper, as it [is] a function of their duty to come forward with relevant evidence which might assist the judge in the making of his determination." *Campbell v. United States (I)*, 365 U.S. at 95.

Thus, the "bridge not crossed" in *United States v. Nobles, i.e.*, "whether the policies against putting in issue the credibility of the lawyer who will sum up to the jury outweigh the jury's interest in obtaining all relevant information" (422 U.S. at 253 (White, J., concurring)), is not even within walking distance in the case at bench. As pointed out by amici (Amici Brief at 33), the Government by its own doing chose to

[8]For example, in *United States v. Aviles*, 315 F.2d 186 (1963), at a hearing on the defendant's motion for a new trial, the Assistant United States Attorney testified as to the making of his notes, and the trial court initially ruled that some of the notes were producible as Jencks Act statements. 200 F. Supp. 711, 715-16 (S.D.N.Y. 1961). While the Court of Appeals affirmed the defendant's conviction–the trial court had applied an erroneous standard of law to the issue of production–the Second Circuit reproached the Government for not turning over the prosecutor's notes for in camera inspection during the trial. 315 F.2d at 192 n.3.

interview the chief witness outside the presence of either of its two postal inspectors. Further, the defense bar has long been laboring under the burden that it may well have to forego impeachment of a witness when the lawyer's testimony is the only available evidence to impeach that witness. In fact, this very situation occurred in the trial of this case, when both defense attorneys were prohibited from testifying as to events which flatly contradicted two Government witnesses' testimony. This rule was imposed by the trial court, even though one of the defense attorneys offered to withdraw from further representation of petitioner. (*See* Petition for Certiorari at 32-35, and citations to the record contained therein.)

II.

THE PROPOSAL OF THE GOVERNMENT TO DISPENSE WITH EVIDENTIARY HEARINGS AND IN CAMERA INSPECTION BY THE TRIAL COURT IS PREPOSTEROUS

Ultimately, the Government advances the proposition that when a prosecutor states to the court that notes are not statements of a witness, as defined in the Jencks Act, there is no need for an evidentiary hearing on the nature of the notes or for an in camera inspection by the trial judge to determine whether they are statements within the meaning of the statute. (Resp. Br. at 30, 60-61) Even in the abstract, this is a startling proposition, to say the least! If accepted by this Court, it would mean that the final arbiter of what constitutes that which should or should not be produced is not the

court, but the prosecutor—which would reduce the judiciary to a passive observer relegated to accepting whatever any prosecutor said to it at any time about any witness' "statements."[9] In the context of the case at bench, it is the height of insolence for the Government to contemplate, let alone advance such a notion, considering the chronology of events.

A. It Was Not Until After This Court Granted Certiorari That The Government Revealed For The First Time That Forty Pages Of The Notes Were Written By The Witness Newman

Not only has the Government not been consistent in its reasons for opposing production of these notes, but also it has been far less than candid in stating precisely what is encompassed within the 237-page packet of materials. Before the trial court, the Ninth Circuit, and this Court in the Government's opposition to the Petition for Certiorari, there was not a hint that the notes, or any portion thereof, were in fact authored by the witness himself, as opposed to the prosecutors. In fact, the Government's opposition to the certiorari alleged just the opposite. Not until after this Court granted the petition, and while petitioner was completing his opening brief, did this fact, *viz.* that 40 pages of the notes were written by Newman, himself, emerge

[9]Petitioner had assumed that this Court's prior decisions would have laid to rest such a contention on the part of the Government. *See Campbell v. United States (I),* 365 U.S. at 92-96; *Palermo v. United States,* 360 U.S. at 354-55; *cf. United States v. Nixon,* 418 U.S. 683, 703-05 (1974).

from the woodwork. This concealment by Government attorneys demonstrates more forcefully than anything petitioner can say why there must be an absolute requirement that the trial court conduct an in camera inspection.

The chronology of events is depicted by the following summary:

CHRONOLOGY OF VARIOUS DESCRIPTIONS GIVEN TO "NOTES" CONCERNING NEWMAN CONVERSATIONS

	DATE	PLACE	CHARACTERIZATION BY:	NOTES EXAMINED BY COURT	CHARACTERIZATION AND REASONS FOR NON-PRODUCTION	LOCATION OF NOTES WHEN CHARACTERIZATION MADE
1.	6/27/73	Trial Court	Trial judge [none by prosecutor]	No	"Attorney's work product, notes of interviews with witnesses." (Ap. 94)	Asst. U.S. Attorney
2.	6/28/73	Trial Court	Trial judge [none by prosecutor]	No	"These are notes made by a trial attorney in preparation for trial . . ." (Ap. 97)	Asst. U.S. Attorney
3.	7/2/73	Trial Court	Prosecutor	No	". . . merely our notes which reflect substances of conversations, our impressions, certain entries . . . classified as trial strategy. They were not taken down verbatim. They were not shown to the people that we were interviewing. Nobody was asked to sign them in the form of a signed statement, and we feel that it (sic) is properly the work product of counsel and we would stand on that." (Ap. 98)	Asst. U.S. Attorney
4.	6/28/74	Ninth Circuit	Prosecutor	No	Abandons work product privilege, contends notes do not constitute statement under 18 USC 3500(e). ". . . entries were often prepared only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached. They were not written to preserve testimony, nor do they ever reflect the complex degree of conversation which preceded their recordation . . . (Appellee's brief, Cir. Ct., p. 64)	Government wrongly contended to Circuit that notes were part of trial record (pp. 64, 67, Appellee's Brief.)
5.	8/12/74	Ninth Circuit	--	Lodged	--	Govt. admitted notes not in trial record; now lodging all notes could then find
6.	12/18/74	Ninth Circuit	Ninth Circuit	?	Notes "were not statement of *defendant* within the meaning of 3500(e)" (Ap. 120)	--
7.	5/30/75	Supreme Court	Solicitor General		"[P]rosecutor's handwritten notes . . . included the prosecutor's impressions, points of trial strategy, and explanations by witness of items of physical evidence concerning which he himself did *not* testify. . . . [T]he notes did not comprise a 'statement' within the meaning of the Jencks Act." (Govt.'s opposition to petition for certiorari, p. 4)	Ninth Circuit
8.	11/75	Supreme Court	Solicitor General		For the first time, Gov't admits that 40 pages of notes are actually in Newman's handwriting. Additionally, Gov't lists 17 pages written by Asst. U.S. Attorney Keilp, and 170 pages written by Asst. U.S. Attorney Lebowitz (Gov't. Br., pp. 15-17)	Supreme Court

The Government, in describing the 237 pages of notes, states that they have "been forwarded to this Court because their examination may aid a proper resolution of this case, *as it did in the court below*." (Resp. Br. at 15, emphasis added) Thus, the Government seeks to leave this Court with the impression that the Ninth Circuit was privy to an understanding of what these notes were, who prepared them, their contents, and what they represented. If this Court has that impression, it is indeed a mistaken one.

In the first place, the Government was never consistent with their description of what precisely constituted the notes. Not even a murmur was emitted by the Government in either of the courts below by way of explanation or clarification concerning these 237 pages. The affidavit of Assistant United States Attorney Lebowitz dated August 27, 1975 (which petitioner is informed has been lodged with this Court), contends only that he "advised the [Circuit] Court that these were all the notes."[10]

[10]Petitioner disputes the fact that these were the words used and states, in the affidavit of his counsel filed herewith as Exhibit "A", that what the prosecutor actually said to the Panel on August 12, 1974, was that "these are all the notes I could now find." As noted by petitioner (O.B. at 23), up until the time of oral argument before the Circuit Court, the Assistant United States Attorney handling this case had been claiming that the notes were part of the sealed record–a claim which was then refuted by the record and ultimately so acknowledged when the prosecutor resorted to unilaterally supplementing the record by lodging "all the notes [he] could now find" on August 12, 1974. (See Affidavit of petitioner's counsel, attached as Exhibit "A" hereto.)

The sudden appearance at oral argument of 237 pieces of paper with handwritten notations, without any legend as to who wrote what, let alone when it was written or under what circumstances, obviously confused the Court of Appeals. Accordingly, it characterized these very notes as "not statements of the defendant" (Ap. at 120), a contention never made by petitioner or even the Government.

B. An Analysis Of The Notes Reveals Detailed Recordation Of Information Received From Newman

The Government's brief contains a section entitled "The Nature of the Notes" (Resp. Br. at 18), wherein they purport to explain the contents of the notes, who authored them, and their purpose.[11] The pagination of the 237 pages of those notes lodged with this Court follows no format; and the 40 pages of Newman's writings are interspersed with the handwritten notes of Lebowitz, which are in turn interspersed with those written by Keilp.[12] While the Government characterizes these notes as containing jottings, to someone familiar

[11]Of course, there is no citation to the record below to support these averments since the notes were never before the trial court, nor was any explanation of these notes before the Ninth Circuit. Further, the organizational pagination of the notes makes it very difficult for any meaningful review of these notes to be undertaken by any person not intimately familiar with the record below.

[12]The Government attributes the authorship of these notes as follows: Newman: pp. 18-19, 126, 147, 208, 224-238. Lebowitz: pp. 2-17, 20-40, 43-97, 102-125, 148-186, 191-198, 207, 209-210, 213-215, 217-223. Keilp: pp. 41-42, 187-190, 199-206, 211-212, 216.

with the testimony of the witnesses and issues of the case, those jottings are neither puzzling nor cryptic.[13]

The Government argues that some of these notes were the prosecutors' notes for cross-examination. Assuming *arguendo* that a prosecutor's own notes in preparing for cross-examination are not compellable under the Jencks Act, the remaining 116 pages of notes not concerned with cross-examination reflect the following categories of information related to the Government attorneys by Newman:[14]

1. Pages on which direct quotations of conversations appear: 63, 156, 157, 170, 177, 186.

2. Pages on which conversations between Newman and petitioner, and/or events between petitioner and annuitants or lenders, are stated to have occurred: 10, 14, 20, 23, 25, 31, 32, 35, 36,39,41, 45, 46, 47,49, 50, 51, 52, 57-60, 62, 151-153, 156, 158-161, 164, 169, 170, 171, 172-176, 211, 218- 220, 222, 223.

3. Pages on which conversations or events between Newman and another are stated to have occurred: 31, 33, 35-37, 45-48, 50-52, 56, 159, 160, 167-170, 173, 176, 212, 213-215, 216, 221.

[13]Petitioner is somewhat hampered in examining the notes lodged by the Solicitor General because portions of the pages furnished are illegible, particularly the lower righthand corners and in the lefthand margins of the following pages: 9, 10, 11, 12, 14, 15, 16, 20, 28, 30, 32, 35, 36, 37, 38, 50, 77, 78, 81, 83, 86, 87, 88, 91, 95, 97, 103, 104, 108, 109, 118, 121, 124, 135, 136, 140, 141, 156 and 214.

[14]Of the 237 pages of notes lodged with this Court, the prosecutors prepared a total of 193 pages. 77 pages appear to reflect questions written for use in cross-examination. The excluded pages are: Mr. Lebowitz—pp. 64-125 (cross-examination of petitioner); 191-195 and 198 (cross-examination of Schwartz); 209, 210 and 217 (cross-examination of Paradine). Mr. Keilp—pp. 187-190 (cross-examination of Schwartz).

4. Pages on which conversations or occurrences between Newman and one of FSL's attorneys are alleged to have occurred: 14-16, 18, 20, 30, 41,47, 53, 55, 177, 178, 179, 181, 182, 183, 186, 196, 218, 219, 221.

5. Pages which reflect events observed or participated in by Newman which were alleged in indictment: 17, 20, 41,45-47, 50, 51, 53, 54, 63, 151, 170, 172-175, 177, 178, 186, 196, 213, 214, 220, 221.

6. Pages which reflect the involvement of other attorneys in the operation of FSL: 13, 15, 21, 34, 148, 159, 177.

7. Pages which reflect matters concerning petitioner's utilization of annuities: 62, 63, 150, 151, 153, 156, 164-166,197.

8. Pages which reflect events concerning examination of FSL by the Arizona Insurance Commission: 61, 205, 206, 218, 219, 221-223.

While it is true that on many of the pages noted in these categories there are doodlings and jottings and marginal notations, that does not mean that the information provided by Newman, *i.e.*, dates, times, places, conversations, and who did what, when, does not appear—for it does. Furthermore, on those pages noted in the eight categories above, there are few, if any, entries that can truly be referred to as trial strategy.

Additionally, there are 40 pages of notes in Newman's own handwriting which even the Government must admit constitute statements of the witness within the meaning of the Jencks Act. As to 13 pages of these notes (pp. 126-129 and 131-138), the Government argues that these are questions prepared by Newman

concerning examination of petitioner, and thus could not be used to develop inconsistencies in Newman's testimony from the witness stand. (Resp. Br. at 68-69) Petitioner disputes that notion, and the questions appearing at these pages in fact are written in such a fashion as to give Newman's version of the events to which they are addressed. All of Newman's notes were a writing in his own hand and relate to events involved in petitioner's prosecution. It is sophistry to suggest that questions of the sort here do not constitute a statement within the meaning of the Jencks Act merely because they are not written in narrative form.

In reviewing these notes—the prosecutors' as well as Newman's—it must be remembered that the witness Newman, according to the Government at the appellate level at least, was involved intimately in the prosecution of the Government's case against petitioner. (Resp. Br. at 17-18) Indeed, at one point the Government characterizes his participation as rendering "legal advice . . . to the prosecutors." (Resp. Br. at 17 n.12) Newman's involvement with the prosecutors and the fact that he spent well in excess of 40 hours assisting the Government, as established in the record below, plus the fact that the prosecutors when taking notes sometimes read back to him his answers, and he would correct them, preclude the Government's assertion that the notes were not "adopted or approved" by him. As stated by the prosecutor to the Ninth Circuit, and as reiterated by the Solicitor General in his brief to this Court, "these entries were often prepared only after lengthy conversations had occurred and a *mutual understanding* of the factual situation had been reached." (Resp. Br. at 18) The argument that the

notes were not adopted or approved by the witness is belied by the record.

Further, the Government overlooks the fact that Newman and his credibility were the key to the prosecution's case. If the notes had been made available to petitioner, he would have been able to explore to greater depth the areas only superficially touched upon by the prosecutors when questioning Newman on direct examination, and petitioner could have conducted a far more searching inquiry on cross-examination, not only concerning Newman's testimony on direct, but also concerning the true extent of Newman's involvement with the prosecutors.

III.

THE FAILURE OF THE TRIAL COURT TO COMPLY WITH THE EXPRESS REQUIREMENTS OF THE JENCKS ACT WAS PREJUDICIAL ERROR REQUIRING A NEW TRIAL

The Government argues that its failure to produce the notes to the trial court at most could be harmless error (Resp. Br. at 67) and that, even if remand were ordered, the remand in all probability would result in the District Court's concluding that the error was harmless. Such a course would permit the Government to ignore the plain requirements of the Jencks Act and sit back and hope that, if it is later uncovered, the Government will have the opportunity to convince some appellate court that at most its violation was only harmless error. The production of the notes—be they

written by the prosecutor or by the witness Newman—and their utilization by the defense are not questions for unilateral resolution by the Government. *Bary v. United States*, 292 F.2d 53, 58 (10th Cir. 1961) And it is not for the courts, especially the appellate courts, to look at a cold record and speculate whether these statements could have been used effectively. *Clancy v. United States*, 365 U.S. 312, 316 (1961).

In *United States v. Tomaiolo*, 280 F.2d 411 (2d Cir. 1960), the Second Circuit followed this Court's holding in *Palermo* in amplifying the need for full disclosure as a component of fair trial. In *Tomaiolo*, the court was faced with an appeal from the third robbery trial of the defendant. Despite overwhelming evidence of guilt, the Government's failure to turn over one particular Jencks statement directed the court's action in reversing the conviction. The court reasoned:

> "Since the defendant has already been tried three times, it is unfortunate that we feel compelled to reverse and to order yet a fourth trial. And it is perhaps doubly unfortunate that this must occur because of the reluctance of the prosecutor and the trial court to accept the policy of yielding pre-trial statements of prosecution witnesses to the defense for purposes of cross-examination as defined in [*Jencks v. United States* and the Jencks Act]. Here the statement refused the defense was that of the key witness for the prosecution . . . and we think reversal compelled under *Palermo v. United States*, 360 U.S. 343, 79 S. Ct. 1217, 3 L.Ed.2d 1287, and our own decision in *United States v. McKeever*, 2 Cir., 271 F.2d 669." 280 F.2d at 412.[15]

[15]The facts of *Tomaiolo* are similar to those in the instant case to the extent that the statement was of the key prosecution witness who was an unprosecuted accomplice of defendant, and who had made several statements to the F.B.I. One of the statements was turned over to the defendant, but the other was not because it had not been signed by the witness, and had been prepared by one of the interviewing agents. The unsigned statement, however, had been read and reviewed by the witness, who had made corrections, insertions, and other initialed changes 22 times in the document. 280 F.2d at 413. The unsigned statement contained information contradictory to the one turned over to the defendant, *i.e.*, that the witness did not recall seeing the defendant present at a critical point in the commission of the offense.

Judge Learned Hand, in reversing a defendant's criminal conviction because of the Government's refusal to allow defense use of a document thought privileged from disclosure, stated: "We cannot of course know . . . how prejudicial the exclusion may have been, but that uncertainty alone requires a new trial. . . ." *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944). *See United States v. Missler*, 414 F.2d 1293, 1303-04 (4th Cir. 1969) ("Unless it is perfectly clear that the defense was not prejudiced by the [failure to comply with the Jencks Act], reversal is indicated."); *accord, United States v. Cleveland (I)*, 477 F.2d 310, 316 n.9 (7th Cir. 1973); *United States v. Aaron*, 457 F.2d 865, 869 (2d Cir. 1972).

That this is a logical position in light of an appellate court's responsibility *not* to draw conclusions from the use or effect of heretofore absent evidence at trial was recognized by this Court in *Clancy v. United States*, 365 U.S. at 316,[16] when it stated that:

[16]*Clancy* involved memoranda made by F.B.I. agents who testified at trial, which were prepared after interviewing the defendants. Those memoranda related to the trial testimony of the agents. Likewise, in the present case, the notes *written by Newman* related to his trial testimony, and were prepared during meetings with the prosecutors. The Government's assertion that *Clancy* is inapposite to the instant case (Resp. Br. at 54-55 n.35) is plainly wrong as to the notes written by Newman, since he testified at trial. This assertion can only be in reference to the notes taken by the prosecutors.

"Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively."

IV.

THE FAILURE OF THE GOVERNMENT TO PRODUCE AND IDENTIFY NEWMAN'S HANDWRITTEN NOTES SHOULD BE CONSIDERED PLAIN ERROR, AND REQUIRES REVERSAL

The United States has now conceded that certain notes contained in its files are the handwritten notes of Newman, only "now" discovered in the preparation of its brief. These notes clearly fall within the production mandates of the Jencks Act under paragraph (e)(1), even under the restrictive interpretation urged by the Government for attorneys' notes. (Resp. Br. at 60)

> "[I]f the witness writes out a narrative statement of certain events in his own handwriting, such a statement would constitute a written statement made by said witness and signed or otherwise adopted or approved by him within the meaning of 18 U.S.C. 3500(e)(1).... [S]even pages of the notes handwritten by Newman in this case appear to be precisely that kind of statement." (Resp. Br. at 28)

The seven page narrative relating to the activities of Paradine (pages 232-38 of the notes), as well as the remaining 33 pages in Newman's handwriting (Section II-B, p. 13 *supra*), are unquestionably the type of statements the disclosure of which is required by the

Jencks Act. Nevertheless, the Government asserts that the required production of this statement was "waived" because of the failure to make a Jencks Act request for disclosure of the material after Newman testified on redirect examination. (Resp. Br. at 67)

The Government's waiver argument does not hold water. *First*, this argument ignores the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). Irrespective of the merits of the argument that failure to renew the Jencks Act motion constitutes waiver, the effect of the *Brady* motion is not dissipated by time. Here the petitioner moved for production under the *Brady* doctrine both during cross-examination of Newman (Ap. 53-56, 98-99) and at the close of the Government's case (Ap. 99-100).

> "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though ... his action is not 'the result of guile'...." *Brady v. Maryland*, 373 U.S. at 87-88.

Both the facts of the case at bench, and the nature of the material withheld, bring it squarely under the rule of *Giglio v. United States*, 405 U.S. 150 (1972). Issues of the consistency of this narrative with other testimony aside, the very fact, for example, Newman wrote out narratives of the witness Paradine's involvement with petitioner by itself is material to the issue of Newman's credibility, for it reveals the extent of his alliance with the prosecution in a manner not replicable simply by cross-examination as to the content of a plea bargain. *See id.* at 153-55.

Second, during direct examination of Newman[17] petitioner questioned both Newman and the prosecutors as to whether Newman had turned over any documents, books, records or papers to the Government. Both Newman and the prosecutor made affirmative representations that no such transfer of materials had occurred, with certain limited exceptions not relevant here. Whether or not the Newman materials were in existence at that time,[18] their creation and delivery to the prosecutors made these affirmative representations no longer correct. Thus, if the Newman writings were in existence when the prosecutors denied they had received any items from him, there is a clear violation of the doctrine of *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), through the deliberate deception of the trial court. If the Newman materials were developed later, the failure to correct a record that was then no longer accurate was a violation of the principles underlying *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In either case, "suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' " *Giglio v. United States*,

---

[17]*See* Reporter's Transcript of trial, pages K60-63, a copy of which are attached hereto as Exhibit "B".

[18]The prosecution was in the best position to know when the notes were created and to conclusively establish that fact by lodging the notes with the trial court for preservation in the record. By lodging these in the Ninth Circuit as the notes which were the subject of the Jencks Act and *Brady* demand by the defense during the cross-examination of Newman (Ap. 53-56, 98-99), the Government should be considered to be foreclosed from now contending that the notes were not in existence at that time (Resp. Br. at 67, 71).

405 U.S. at 154, *quoting Brady v. Maryland*, 373 U.S. at 87.

Third, the waiver doctrine advanced by the Government (Resp. Br. at 67) on the basis of petitioner's failure to renew the Jencks Act motion after Newman had testified in rebuttal is based on scant authority and dubious logic. The sole case cited by the Solicitor General in support of this proposition, *United States v. Wisener*, 494 F.2d 516 (5th Cir. 1974), must rest on the fact that there was no showing of any kind of the existence of possible statements requiring in camera inspection by the trial judge, and there was not even a request for such an inspection by defense counsel. The most cursory examination of that case demonstrates that it bears no factual resemblance to the case at bench. Furthermore, the *Wisener* case regarded as standing for the existence of a waiver doctrine, which a close reading of the case renders doubtful, the circumstances of this case render such a doctrine inapplicable.

The prosecutors made affirmative representations that they possessed no notes that were not attorney work product. (Ap. 98) Under no stretch of the imagination can Newman's writings be considered part of the prosecutor's work product. *Cf. Hickman v. Taylor*, 329 U.S. 495 (1947); *Fed. R. Civ. P.* 26(b)(3). *See also United States v. Nobles*, 422 U.S. at 236-40. The trial court's final ruling denying production of the notes was based in part upon the representations of the prosecutors regarding the notes. (Ap. 98-99) Given the trial judge's hostility to petitioner's Jencks Act motion as manifested on three separate occasions (Ap. 94, 97, 99), and the affirmative representations of the prosecu-

tors that they possessed only "work product," it would have been nothing short of a waste of breath for petitioner to have renewed his motion at the close of Newman's direct examination in rebuttal. The ancient maxim, *"lex neminem cogit ad vana seu inutilia peragenda"* (the law compels no one to do vain or useless things), clearly is appropriate in this context. Since "only the government knows the content of its own files" (*Ogden v. United States*, 303 F.2d 724, 733 (9th Cir. 1962)), to hold that there was a waiver of the right to producible statements in the context of this case is to retreat to a "game of verbal jackstraws" where the defense would have to comply with "the niceties of ancient common law pleading in the formulation of demands for producible statements." *United States v. Aviles*, 315 F.2d 186, 190-91 (2d Cir. 1963) Such a requirement would be inconsistent with both the terms of the Jencks Act and the prior decisions of this Court.

Nevertheless, the Government asserts that the limited grant of certiorari in the present case forecloses consideration of these notes. (Resp. Br. at 78)[19] Not only does this assertion underscore the fallacy of a

[19]The Government's assertion is made with the almost apologetic explanation that petitioner had no way of knowing the existence of these notes at the time the petition for certiorari was filed, as the author of the Government's response "first became aware that some of the notes were written by Newman himself during the preparation of the brief in this Court." (Resp. Br. at 66) It is especially curious that perusal of the notes only at this stage in the proceedings engendered discovery of their authorship. The Government necessarily had to closely view the notes when it searched its materials so as to produce the notes for "lodging" before the Ninth Circuit.

frightening Government contention[20] but it also ignores the historical power of this Court to deviate from the grant of certiorari in order to notice plain error. Additionally, in light of the circumstances involved in this action, such a purported disposal of the question fails to account for the *Brady* implications attendant to suppression of producible materials—a subject expressly before this Court under the grant of certiorari. The Government cannot now be permitted to sweep under the rug, because of petitioner's failure to raise the question on his Petition for Certiorari, the issue of production of Newman's own writings. After all, the existence and authorship of those writings was denied by the Government until after this Court granted the petition.

A. The Doctrine Of "Plain Error" Enables This Court To Consider Errors Of Grave Dimension Which Fall Without The Grant of Certiorari

Under Rule 52(b) of the Federal Rules of Criminal Procedure and Rule 40(1)(d)(2) of the Revised Rules of the Supreme Court of the United States, this Court has "the power to notice a 'plain error' though it is not assigned or specified." *United Brotherhood, C.J. v. United States*, 330 U.S. 395, 412 (1947). As explained in *Silber v. United States*, 370 U.S. 717 (1962):

[20]"There is no more reason to require a trial court to look behind the prosecutor's representation that there is no undisclosed *Brady* material in his file than there is to look behind the prosecutor's representation that he has produced all of the prior statements of witnesses in the Government's possession." (Resp. Br. at 76)

> "While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule is not without exception . . . 'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' (Citation)" *Id.* at 717-18.

In appropriate circumstances, such noticed error may be sufficiently egregious in and of itself to justify reversal *sans* consideration of the questions delimited in the grant of certiorari. *See Rogers v. United States* __U.S.__, 45 L.Ed.2d 1, 7 (1975) (discovery after certiorari granted that defendant had not been present at all trial proceedings held independently sufficient for reversal). It is submitted that the posture of the present case, where suppression of clearly producible materials has occurred, requires this result.

B. The Facts In This Case Establish Violations Of Both The Jencks Act And The Doctrine Of *Brady v. Maryland*.

The Government conveniently seeks to lump the notes made by the Assistant United States Attorneys and those written by Newman into one category when responding to petitioner's *Brady* argument. (*See* Resp. Br. at 72 *et seq.*) Thereafter, broadstroke generalities are stated relating to "the prosecutors' notes" and the interplay with the disclosure requirements enunciated in *Brady* and its progeny, all the while neglecting to

extend such interplay to Newman's own statements. This, of course, is understandable because the Government does not want to be forced to admit that in its failure to turn over the conceded Jencks material, *viz.* Newman's own notes, it has engendered a *Brady* violation, independent of any argument that the United States Attorneys' own notes were compellable under *Brady*.

The premise from which the Government proceeds in attempting to distinguish Jencks Act from *Brady* considerations is that:

> (1) The Jencks Act is concerned with prior witness statements directed toward cross-examination and impeachment of that witness at trial;
>
> (2) *Brady*, based on due process concepts, is concerned only with disclosure of material containing exculpatory *facts*, and thus a defendant has no right under *Brady* to materials not containing such exculpatory facts. (Resp. Br. at 74, emphasis in original)

This premise, however, is erroneous in that it unnecessarily limits *Brady* to exculpatory facts, while refusing to acknowledge that impeachment material is one type of material favorable to the defendant envisioned by *Brady*. This Court in *Giglio v. United States*, 405 U.S. at 154, stated:

> "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." (*quoting Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

Second, irrespective of whether material producible under the Jencks Act in the abstract may be considered

exculpatory in a *Brady* sense, the defendant has been deprived of the opportunity to *utilize* it in an *exculpatory manner* when it has been withheld from him. It is from the deprivation of this opportunity that the entire panoply of Fifth and Sixth Amendment rights are brought into play.[21]

There can be no argument with the Government's assertion that *Brady's* concern is with "practices rightly deemed so fundamentally unfair as to deprive a criminal defendant of due process of law." (Resp. Br. at 74) But what is more fundamentally unfair than failure to supply the defendant with material recognized to be a chief weapon in the defense arsenal? To state the question is to answer it. In the instant case, the deprivation of the full ability to portray Newman properly before the jury was " 'constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " *Davis v. Alaska*, 415 U.S. 308, 318 (1974)[22] The grievousness of this error is such as to preclude application of the harmless error rule.

---

[21]As an extension of the due process rationale of *Brady*, this Court may also consider a third fault in the premise: it does not address the situation at bench where the prosecutor repeatedly misrepresented at both trial and appellate levels that all the notes were work product of the Government attorneys, and then later admits its "error" in so representing. Certainly, such "guileless suppression," if it truly be such, expressly falls within the parameters of prior decisions indicating that prosecutorial deception of both the court and defendant is a serious affront to the due process clause.

[22]The Government strenuously argues that Newman testified *consistently* with his previous statements, rather than inconsistently, so petitioner cannot validly claim lost impeachment value from his failure to receive and utilize the statements. (*See, e.g.*, Resp. Br. at 69, 70 n.41) If petitioner were concerned only with impeachment by inconsistent statements, this might be true. However, petitioner submits that the notes were valuable since they demonstrated Newman's bias and interest in securing petitioner's conviction. The Government represented that the plea bargain with Newman was that he would plea to a felony count. Newman denied that the bargain was other than that, but after petitioner's conviction Newman in fact pleaded not to a felony, but two misdemeanors. (*See* Petitioner's O.B. at 55-56) Petitioner argued this to the jury, but was handicapped by not knowing the full extent of Newman's participation in the prosecution. The numerous and detailed statements prepared by Newman to aid the prosecutors in their presentation of the case against petitioner, had they been disclosed, would have significantly supported petitioner's claim that Newman had a very real interest in securing petitioner's conviction.

CONCLUSION

The decision of the court below should be reversed and petitioner granted a new trial for the reasons set forth in Petitioner's Opening Brief and in this Reply Brief.

DATED: December 29, 1975, at Los Angeles, California.

Respectfully submitted,

/s/Donald C. Smaltz
DONALD C. SMALTZ
Attorney for Petitioner,
Philip J. Goldberg

APPENDIX A

SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 74-6293

PHILIP J. GOLDBERG,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

AFFIDAVIT OF DONALD C. SMALTZ

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, DONALD C. SMALTZ, being first duly sworn, depose and say:

1. I am an attorney at law, admitted to practice before the United States Supreme Court and in the States of California and Pennsylvania. I was formerly an Assistant United States Attorney and Special Assistant to the United States Attorney.

2. I represented the petitioner, Philip J. Goldberg, in the trial of this action. I also represented him in the proceedings before the Ninth Circuit Court of Appeals.

3. I have received and read a copy of an Affidavit of Ronald A. Lebowitz dated August 27, 1975, wherein

he represents, *inter alia*, that at the time of oral argument before the Ninth Circuit Court of Appeals he "submitted . . . the totality of these notes taken during conversations between the Government and Edwin Newman . . ." and that Mr. Lebowitz "advised the court that these were all the notes."

4. My recollection is different from that of Mr. Lebowitz concerning what he said about the "notes."

5. I was present at the Court of Appeals on August 12, 1974, the date oral argument was scheduled before the Ninth Circuit. When the case was called on the morning of August 12, I agreed to waive argument if the Panel would agree to read and consider appellant's reply brief which had been lodged, but not filed. I explained to the Panel that said reply brief had been due July 22, 1974; because I was out of the country when the Government's brief was received on July 1, 1974, I requested (on July 8) a 10-day extension until August 1, 1974, to file appellant's reply brief; that on July 31, 1974, the day before said reply brief was due, the senior judge on the Panel, Honorable M. Oliver Koelsch, issued a telephonic order stating that I could only file the brief on the due date, August 1, if it were no more than 10 pages in length; that at the time my office received the call on July 31, the reply brief had been written and was in the final typing stages, and there was no way to reduce it to 10 pages in one day; that the reply brief was completed and lodged with the court, but Judge Koelsch had refused to permit it to be filed.

6. After a brief bench conference between the three judges, they indicated they would read and consider that reply brief if I waived oral argument.

7. Mr. Lebowitz then addressed the court and said that, with regard to the third issue in appellant's brief, the Jencks Act matter, he had believed the attorneys' notes had been made a part of the record; that he was now requesting permission to lodge all notes made by Assistant U.S. Attorney Keilp and himself that he could now locate. At that time, Judge Koelsch stated from the bench that the court would permit the notes to be lodged, and the Court adjourned.

8. In August, 1975, I had various telephonic conversations with the Clerk's office for the Ninth Circuit, during which I spoke with Deputy Clerk Ray Hewitt. Mr. Hewitt informed me that there was no tape recording or other record kept concerning what was said by the attorneys in the court on August 12, 1974.

9. The notation on the facing page of the notes to the effect that they were lodged on July 12, 1974, is incorrect and should read August 12, 1974.

/s/Donald C. Smaltz
Donald C. Smaltz

Subscribed and sworn to before me
this 29th day of December, 1975.

/s/Lois Robinson
Notary Public

EXHIBIT "B"

THE COURT: Okay.

Ladies and Gentlemen, we will take our morning recess. You may be excused until the Clerk calls you back.

(Jury withdraws from the courtroom.)

MR. SMALTZ: Your Honor, I'd like to make a motion, if I may, before you leave the bench.

THE COURT: Go ahead.

MR. SMALTZ: Mr. Newman, have you turned over any documents, books, records or papers to the U.S. Government?

THE COURT: Like when?

MR. SMALTZ: Any time before he commenced his testimony this morning?

THE WITNESS: No, sir. All my work and documents has been on documents that were given to me through discovery earlier in the proceedings.

MR. SMALTZ: In other words, the only–

THE COURT: These are Government documents?

THE WITNESS: That's right.

MR. SMALTZ: You don't have any of your own personal records or anything else that you've used in refreshing your recollection or turned over to the Government?

THE WITNESS: No, I have no records.

MR. SMALTZ: No copies of any files whatsoever?

THE WITNESS: No, not that I recollect.

MR. SMALTZ: I will ask Government counsel, has Mr. Newman turned over anything to you in the form of documents, papers, books, records, et cetera?

I'll direct the question to Mr. Marshall.

THE COURT: I think Mr. Marshall is getting the question now.

MR. LEBOWITZ: Well, now, I will say one thing that Mr. Newman did turn over to us and that was an exhibit that was read out to the jury last Friday which was a memorandum and he also turned over another letter which I believe is dated sometime in May of 1969, copies of–

THE COURT: Are these documents that have been given to counsel?

MR. LEBOWITZ: Oh, yes. They were given to counsel prior to the beginning of this trial.

THE COURT: Satisfied, Mr. Smaltz?

MR. SMALTZ: Is that all?

THE WITNESS: Yes, sir.

MR. LEBOWITZ: That's the only thing that I've received.

THE WITNESS: I'm sorry that I didn't recall those two. I thought you meant documents relating to the transaction.

MR. SMALTZ: That's all.

MR. LEBOWITZ: One other thing I'd like to put on the record at this time, if I may.

Your Honor, as the Court is aware and Mr. Smaltz is quite correct, the agreement was written and it was filed and it was held under seal, that I'd like to make the statement at this time that the entirety of the agreement was not testified to in the presence of the jury.

The reason for this is that Point 2 of this agreement, if it was brought out in the Government's case in chief on direct evidence, could be construed upon an improper commentary on the defendant's insistence or

assertion of his right to go to trial. And Section 2 of this particular agreement states that in the event that the defendant were to enter a guilty plea, that Mr. Newman–

THE COURT: Well, Mr. Smaltz has a copy of it. He can use it.

MR. SMALTZ: No, I don't, not yet.

THE COURT: Well, he is giving it to you now.

MR. LEBOWITZ: Mr. Smaltz is getting a copy of it now and I'd just like to state we have no intention of bringing this out on direct evidence and if Mr. Smaltz wants to bring it out on cross, I cannot control that.

THE COURT: That's a matter for the discretion of the defendant and his counsel.

Okay. We will stand at recess for awhile.